

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act*, R.S.B.C. 1996, c. 113

-by-

Kevin S. Paterson

(“Paterson”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 1999/547

**DATE OF HEARING:** November 15th, 1999

**DATE OF DECISION:** December 6, 1999

**DECISION**

**APPEARANCES**

Kevin S. Paterson	on his own behalf
Ian Reith, Barrister & Solicitor	for Whiski Jack Resorts Ltd.
No appearance	for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Kevin S. Paterson (“Paterson”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 12th, 1999 under file number ER 10-933 (the “Determination”).

The Director’s delegate determined that Paterson was never employed by Whiski Jack Resorts Ltd. (“Whiski Jack”) and, accordingly, his unpaid wage complaint (including a claim for compensation for length of service) against that latter firm was dismissed.

The appeal hearing was held at the Tribunal’s offices in Vancouver on November 15th, 1999 at which time I heard the testimony of Paterson, who appeared as the sole witness on his own behalf. Whiski Jack’s legal counsel appeared and testified as the sole witness on behalf of that firm. The Director did not appear at the appeal hearing.

**ISSUE TO BE DECIDED**

The sole issue to be determined is whether the delegate correctly determined that “Paterson was not an employee of Whiski Jack [but] was an employee of [Anthony] Trister” (see Determination, page 2).

In my view, the delegate erred in determining that Paterson was not employed by Whiski Jack. At the very least, even if Paterson was employed by Anthony Trister rather than by Whiski Jack (a finding I am not prepared to make), Whiski Jack was nonetheless liable to pay Paterson’s wages by reason of section 95 of the *Act*.

**FACTS AND ANALYSIS**

Paterson was engaged, nominally by one Anthony Trister (“Trister”), as a telemarketer. Paterson’s job was to market “mini-vacations” to would-be purchasers of Whiski Jack’s “timeshare” vacation homes in Whistler, B.C. Paterson was not involved in the actual sale of timeshare interests; rather, his job was to sell “mini-vacations”. The “mini-vacation” is Whiski

Jack's principal marketing tool--individuals, for a relatively low price, are invited to enjoy a brief Whistler vacation during which time they must attend a sales presentation made by a Whiski Jack representative.

The Tribunal has addressed the question of whether or not telemarketers are "employees" in a number of decisions and has generally found that despite the form of the relationship (the telemarketer is usually characterized as an "independent contractor"), the true relationship between the parties is that of employer-employee [see *e.g.*, *Re Project Headstart Marketing Ltd.*, B.C.E.S.T. Decision No. 164/98]. The atypical aspect of the instant appeal is that the appellant was not characterized as an independent contractor; rather, he was characterized as an employee of an independent contractor, namely, Trister.

Given the uncontradicted evidence before me, it appears clear that Trister was not, in fact, a true independent contractor but rather was himself a Whiski Jack employee. Further, and in any event, I conclude that Paterson was directly employed by Whiski Jack despite the apparent form of the relationship which purported to characterize Paterson as an employee of a Whiski Jack contractor. At the very least, Whiski Jack "indirectly" allowed Paterson to perform the work normally performed by an employee [see section 1 definition of "employee", subparagraph (b)].

It should be remembered--as this Tribunal has reiterated on many occasions--that the definition of "employee" contained in section 1 of the *Act* is a broad definition, arguably wider in scope than the various "common law" tests that are used to determine whether or not one is an employee for purposes of the law of contract or tort. However, even if one applied the most commonly accepted common law test, namely, the so-called "Four Factor" test (control, ownership of tools, opportunity to profit, risk of loss), I am of the view that Paterson was a Whiski Jack employee. I say this principally because Paterson's work was closely directed and controlled by Whiski Jack and, in carrying out his duties, he used only Whiski Jack's tools and equipment.

In coming to the conclusion that Paterson was a Whiski Jack employee, I am particularly influenced by the following (and none of this evidence is contradicted):

- The job advertisement to which Paterson responded set out a "Whiski Jack" telephone number;
- Initially, in response to the advertisement, Paterson spoke with one Kim Ward--admittedly, a manager or administrator employed by Whiski Jack;
- Paterson's initial interview took place at Whiski Jack's office in West Vancouver;
- During virtually the entire course of his employment as a telemarketer, Paterson worked out of Whiski Jack's office in West Vancouver using equipment owned by Whiski Jack (desk, telephone, fax machine) and, during a portion of his tenure, he had a key to the premises;
- Whiski Jack exercised substantial control over Paterson's activities--for example, "directives" were given to Paterson by Whiski Jack marketing managers and a telephone "sales script" that Paterson was expected to follow was prepared by Whiski Jack;

- Paterson was connected to the “in-house” Whiski Jack voice mail system and was listed on the in-house telephone directory;
- Internally, Trister was simply referred to as a Whiski Jack group or team leader;
- Whiski Jack offered sales incentives to Paterson and other telemarketers in the form of sales contests with prizes provided by Whiski Jack;
- Paterson occasionally attended trade shows and other expositions and during such attendances Whiski Jack provided him with name identification tags showing that he was a “Whiski Jack” representative;
- Paterson was provided with a Whiski Jack employee handbook and given blank “Whiski Jack” business cards upon which he could record his own name;
- All of the sales material utilized by Paterson in his telemarketing endeavours, including brochures etc., were prepared by Whiski Jack;
- On at least one occasion, Paterson was congratulated in an in-house Whiski Jack newsletter;
- Whiski Jack’s legal counsel acknowledged that Whiski Jack would discipline telemarketers albeit through the “independent contractor” who would be instructed to carry out the necessary warning or, if need be, termination;
- When Paterson’s employment was terminated, the termination was not carried out by Trister, but rather by a senior Whiski Jack official.

Although Paterson was mainly supervised by Trister, Whiski Jack clearly maintained, and occasionally exercised, residual supervisory authority. And although Paterson was paid by Trister (who in turn billed Whiski Jack directly), I am satisfied that, on balance, this payment scheme was a mere subterfuge to create the impression that Trister was an independent contractor and that, in turn, the telemarketers working under Trister’s supervision were employed by Trister rather than by Whiski Jack. Although Trister is described as an independent contractor in his “telemarketing contract” with Whiski Jack, Trister’s independent authority is so closely circumscribed by the agreement that it amounts to an employment agreement. For example, under the terms and conditions of Trister’s “telemarketing contract” Whiski Jack:

- provided all marketing leads;
- retained “script approval” regarding all telemarketing calls to sales prospects;
- directed that Trister report to its Director of Marketing;
- allowed Trister to use Whiski Jack’s facilities without charge;
- required Trister to “recruit, hire, train, motivate, supervise and review the performance of [telemarketers] *under the direction of [Whiski Jack’s] Director of Marketing*”;

- required Trister to “suspend or terminate telemarketing personnel as necessary *under the direction of [Whiski Jack’s] Director of Marketing*”;
- maintained the right to terminate telemarketers for breach of Whiski Jack’s substance abuse policy and required all telemarketers to have “good personal appearance”; and
- had Trister acknowledge “that he will be acting *exclusively* for Whiski Jack resorts”.

(my *italics*)

If Trister was a Whiski Jack employee during the relevant time period, it logically follows that Paterson was also a Whiski Jack employee. However, leaving aside Trister’s involvement, I am of the view that at all material times Paterson was a direct employee of Whiski Jack.

As set out in section 1 of the *Act*, an “employer” exercises “control or direction” over an employee and Whiski Jack, as noted above, certainly directed and controlled Paterson. Further, the evidence shows that Whiski Jack was, ultimately, Paterson’s paymaster although Paterson’s wages, in the form of commissions earned from the sale of Whiski Jack’s “mini-vacations”, were funnelled through an intermediary in the person of Trister. Trister invoiced Whiski Jack weekly (a gross amount without charging any GST) and used the funds received from Whiski Jack to, in turn, pay Paterson and the other telemarketers Trister supervised--all of whom were also paid on a weekly basis.

Even if it could be said that Trister, rather than Whiski Jack, was Paterson’s employer, Trister was so closely enmeshed in the Whiski Jack operations--and subject to Whiski Jack’s exclusive direction and control--that both firms might well be considered to be “associated” businesses as defined by section 95 of the *Act*. Accordingly, Trister and Whiski Jack could be treated as a single employer for purposes of the *Act* and thus both would be jointly and severally liable for Paterson’s unpaid wages.

## **ORDER**

Pursuant to section 115 of the *Act*, the Determination is varied to indicate that Paterson was, at all material times, employed by Whiski Jack. Since the matter of Paterson’s unpaid wage entitlement was not argued before me (nor is there any evidence upon which I could determine his entitlement), this latter issue is referred back to the Director so that the amount of Paterson’s unpaid wages, if any, may be determined.

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**Kenneth Wm. Thornicroft, Adjudicator**  
**Employment Standards Tribunal**